

SOUTH AFRICA / JUDGMENT

Ganya v S (A215/2013) [2014] ZAFSHC 240 (6 November 2014)

[2014] ZAFSHC 240

COURT

Free State High Court, Bloemfontein

BEFORE

Molemela, Tsatsi

CASE / FILE NUMBER

A215/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Case No: A215/2013

In the matter

between

ALFRED

SERAME GANYA

.....Appellant

and

THE

STATE

.....Respondent

CORAM:

MOLEMELA,

J et

TSATSI,

AJ

JUDGMENT

BY: TSATSI, AJ

HEARD ON: 11 AUGUST 2014

DELIVERED ON: 6 NOVEMBER 2014

- [1] This is an appeal against sentence only. The appellant stood trial in the Bethlehem regional court and pleaded guilty on a charge of attempted murder. He was duly convicted and sentenced to ten years imprisonment on 19 May 2010. He was declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000.
- [2] The appellant's leave to appeal against the sentence was granted by the Regional Court on 7 September 2011.
- [3] The issue to be decided in this appeal was whether or not the 10 year sentence handed down against the appellant was appropriate.
- [4] The appellant's counsel urged us to uphold the appeal and to reduce the sentence to 7 or 8 years. The respondent's counsel urged us to dismiss the appeal and not to interfere with the trial magistrate's decision. It was further submitted on behalf of the respondent that the sentence imposed by the trial magistrate was not inappropriate and unreasonable.
- [5] The appellant was living with the deceased, one Mokofa Nhlapo, as his wife at the time of the deceased's death. The two had a child together who turned two at the time of sentencing of the appellant.
- [6] It was alleged that on 18 October 2008, an argument ensued between the appellant and the deceased. The argument was caused by the fact that the deceased's sister wanted to take the couple's child to some place. The deceased was against this arrangement and refused to have her child taken to the place suggested. During the argument the appellant stabbed the deceased with a knife on her back. The deceased was admitted at Pekolong and later transferred to Dihlabeng Hospital. The doctors found that the deceased was paralysed due to a spinal cord injury as a result of the injuries that she sustained. She passed on at a later stage due to complications from the appellant's stabbing. It appeared from the record that the deceased passed away

around 2008.

- [7] The grounds of appeal relied on were as follows:

7.1 A term of ten years imprisonment was strikingly inappropriate in that it was out of proportion to the totality of the accepted facts in mitigation with special reference to the following:

7.1.1 The appellant pleaded guilty to the charge he was charged of, and therefore took responsibility of his actions. Thereby he demonstrated his remorse for his actions and the consequences thereof.

7.1.2 The deceased was the appellant's wife and her subsequent death was already a great loss to the appellant and a form of punishment in itself.

7.2.3 It was common cause that the assault of the deceased followed a quarrel between the parties and was not premeditated. This also brings an element of provocation into the equation. None of these factors were taken into account by the Magistrate.

7.2.4 At the age of 27 years the appellant had no previous convictions and was thus a first offender.

7.2.5 The appellant did not have a high education level and reached standard 5 at school.

7.2.6 The appellant is the father of a child who at the time of sentencing was 2 years old. The mother of the child was the victim in this matter and had passed away. The appellant was thus a single parent and the primary care giver.

7.2.7 In the matter of *S v Piater* 2013

(2) SACR 254 (GNP) the court referred to matters where a convicted person was a primary caregiver of minor children, and set out the courts' obligations in terms of sections 28(1) (b) and 28(2) of the Constitution. It held that section 28(2) and 28(1) (b) of the Constitution imposed four responsibilities on a sentencing court when a custodial sentence for a primary caregiver was in issue, namely:

- (a) to establish whether there would be an impact on a child;
- (b) to consider independently the child's best interests, not as an appendage to the primary caregiver's personal circumstances;
- (c) to attach appropriate weight to the child's best interests and
- (d) to ensure that the child would be taken care of if the primary caregiver was sent to prison. It was argued that the trial magistrate

did not do the necessary enquiry to follow the guidelines as set out in the case of *S v M* [2007] ZACC 18; 2008

(3) SA 232 CC.

7.2.8 The appellant was employed at the time of the incident and that his income assisted in the maintenance of the minor child.

7.2.9 The trial Magistrate did not consider other more suitable options of punishment.

- [8] It was further submitted on behalf of the appellant that the trial magistrate erred in over-emphasising factors like the seriousness of the offence; the interests of society; the prevalence of the offence; the deterrent effect of the sentencing; the injuries sustained by the complainant.
- [9] Both counsel for the appellant and respondent relied on *S v Banda* 1991 (2) SA 353 (BGD), where the court held that in exercising its discretion it should as much as possible strive to achieve a judicious balance between all relevant factors in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others.
- [10] The appellant's counsel relied on the case of *S v M* (supra). However the respondent gave a contrary view in the same case, quoting paragraph 13 where the learned Sachs J cited the case of *Jooste v Botha* 2000 (2) BCLR SA 187 (T) where it was said that:

"But section 28(2) has a wider formulation. Its wide formulation is ostensibly so all-embracing that the interests of the child would

override all other legitimate interests of parents, siblings and third parties. It would prevent conscription or imprisonment or

transfer or dismissal by the employer of the parent where that is not in the child's best interest. That can clearly not have been

intended. In my view this provision is intended as a general guideline and not as a rule of law of horizontal application. That is left to the positive law and any amendments it may undergo."

- [11] Based on *S v M* (supra) above, the appellant's counsel submitted that the following factors should be taken into account when a custodial sentence for a primary care giver was considered: to establish whether there will be an impact on the child, to consider independently the child's best interest and attach a proper weight thereto, and to ensure that the child will be taken care of if the primary caregiver was taken to prison.
- [12] It was counsel for the respondent's submission that, it was never placed on record that the appellant was a primary care giver. This was despite the fact that the appellant was legally represented at the trial court.
- [13] Counsel for the respondent submitted in his heads of argument that the court has a duty to maintain law and order. The court operates in society and its decisions have an impact on individuals in the ordinary circumstances of daily life. The court must by its decision and imposition of sentence, promote the respect for the law and order. It must reflect the seriousness of the offence and provide just punishment for the offender while taking into account the personal circumstances of the offender (*S v Banda* (supra)).

[14] Further submission made by the respondent's counsel was that the offence the appellant was convicted of was a violent crime. Violence against women in our society is prevalent and the court should not treat such crimes lightly. In *S v Lister* 1993 (2) SACR 228 (A) Nienaber J said the following:

"To focus on the well-being of the accused at the expense of the other aims of sentencing, such as the interests of the community, is to distort the process and to produce, in all likelihood, a warped sentence."

[15] In *S v Sindeni* 1995

(2) SACR 704 (A) at 709 (b) the Court stated as follows:

"A sentence does more than deal with a particular offender in respect of the offence of which he has been convicted. It constitutes a message to the society in which the offence occurred."

[16] Of particular interest is the case of *Director of Public Prosecutions v Mngoma* 2010

(1) SACR 427 (SCA) para [14] where the court said that:

"A failure by our courts to impose appropriate sentences, in particular for violent crimes by men against women, will lead to society losing its confidence in the criminal justice system. This is so because domestic violence has become pervasive and endemic."

[17] It is trite law that the sentence of the accused must be balanced between the interests of Society, the offence and the personal

circumstances of the accused. Counsel for the appellant referred me to this authority (*S v Banda* (supra)).

[18] In *S v Makwanyane and Another* [1995] ZACC 3; 1995

(2) SACR 1 (CC) para 117) Chaskalson P said the following about the level of violent crimes that existed in this country in 1995 and which has not improved:

"The level of violent crime in our country has reached alarming proportions. It poses a threat to the transition to democracy, and

the creation of development opportunities for all, which are primary goals of the Constitution. The high level of violent crime is a matter of common knowledge and is amply borne out by the statistics provided by the Commissioner of Police in his amicus brief. The power of the State to impose sanctions on those who break the law cannot be doubted. It is of fundamental importance to the future of our country that respect for the law should be restored, and that dangerous criminals should be apprehended and dealt with firmly."

[19] Similar concerns were expressed in *S v Matvitvi* 2011

(1) SACR 40 SCA, para [23]:

“Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is ‘no longer business as usual’.”

[20] The offence of which the appellant has been convicted was serious. The general principle the court adopts in an appeal relating to sentence was stated by Nicholas J in *S v Rabie* 1975

(4) SA 855 (A) at 857D-F as follows:

“1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

- (a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and
- (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

2. The test under

- (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.”

[21] The court held in *S v Malgas* 2001 (1) SACR 469 SCA that:

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh.”

[22] In *S v Sondav & Another* 1995

(1) SA 497 (C) at 506H - 507A: Thring J said the following:

“In criminal cases which come before it on appeal this Court has a duty, not only to the appellants concerned, but also to society as a whole. That duty is, broadly speaking, and subject to certain rules and qualifications, to see to it that miscarriages of justice which may have occurred in the courts a quo are set right. Thus, towards an appellant or an accused whose case comes before this Court on automatic review, this Court has a duty, inter alia, to set aside a conviction or a sentence which this Court finds to be vitiated by misdirection, or a sentence which this Court finds to be shockingly or strikingly or disturbingly too severe and, in appropriate circumstances, to substitute a proper sentence. Towards

society, this Court's concomitant duty is to ensure, in all cases with which it is properly seized on appeal, that proper and adequate

sentences are imposed, so that society can be appropriately protected against criminal activities, inter alia, by the deterrent effects of those sentences. A sentence which is shockingly or strikingly or disturbingly too light is as much a

miscarriage of justice as one which is shockingly or strikingly or disturbingly too heavy.”

[23] This Court has a duty to determine whether or not the sentence imposed was disturbingly too light or shockingly inappropriate. I agree with counsel for the respondent that violence against women in this country is pervasive. Although the best interest of the child is of paramount importance, this should not be seen to be used by perpetrators who commit violent crimes against women, as an escape route. As correctly submitted by the respondent’s counsel, it was not put on record that the appellant was the child’s primary caregiver. As the trial magistrate had no indication that that was the case, he cannot be faulted for not embarking on an enquiry pertaining to the child’s best interests. Under such circumstances, the trial court’s failure to consider the applicable guidelines in determining the child’s best interests cannot amount to a misdirection. In any event, although the best interests of the child are an important consideration, they should not be considered in isolation. Competing rights also have to be taken into account; thus a balancing exercise has to be taken on a case by case basis. See *S v M* (supra) at 253 E. Other factors should also be taken into account, like the nature of the offence, the interest of society, the message that the courts are sending out regarding these crimes.

[24] The court in *S v M* (supra), emphasized the fact that the directions in this matter referred to sentencing of primary care givers, not to the wider class of breadwinners. The court stated that a primary care giver is a person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after. In addition the court further said that, it is a person who ensures that the child attends school regularly. The court indicated that it was not called upon in that judgment to deal with delineating the duties of the sentencing court where the breadwinner is not also the primary caregiver. Everything will depend on the facts of a particular case in which such issues are raised. I am of the view that the appellant may be a breadwinner but not necessarily a primary care giver. In this regard the primary caregiver can be said to be the appellant’s sister-in-law, in whose custody the child was at the time of the trial.

[25] The court must be sensitive to the message it sends out to the entire public, and “would-be” perpetrators of violent crimes. I also echo the words of the trial magistrate when sentencing the appellant and the court said that:

“The prognosis for the complainant was that she would have been a paraplegic for life. She was in the prime of her life. She was

seventeen years old. She was doomed after the behaviour by the accused to a life of a wheelchair. She had no control of her bladder

or of her anal functions after a stab would.” The court also noted that as a result of the appellant’s conduct, she would have had to spend the rest of her life in a wheelchair.”

- [26] It is without doubt that the appellant committed a heinous crime. There is also no doubt that this was a vicious assault on a defenceless and vulnerable woman. A young woman who was at the tender age of 17 years and, who had her whole life in front of her. The complainant was attempting to run away, she left the house to protect herself from the appellant. The appellant followed her and stabbed her on her back. Although counsel for the appellant submitted that there was some provocation, this was not evident from the record. Absent any evidence supporting such a submission, I am not inclined to agree with this submission.
- [27] I now turn to consider the sentence imposed by the trial magistrate. There was no persuasive argument intimating that the magistrate misdirected himself in imposing the sentence. A perusal of his judgment on the sentence shows that the trial magistrate took into account all the relevant factors before imposing the sentence. Apart from the personal circumstances of the appellant and the interest of society and other trite considerations, the trial magistrate considered the nature and circumstances in which the offence was committed. The trial magistrate also had regard to the purpose of punishment which is deterrence, preventive, reformatory and distribution.
- [28] I am of the view that the trial magistrate correctly imposed a sentence of ten years. I am not convinced that the sentence was shockingly inappropriate. It is evident from the record that the trial magistrate properly considered the triad of sentence. The following mitigating factors were considered by the trial magistrate: that the appellant was 27 years old, he was a first time offender with no previous convictions, he had no high school education and only reached standard five, he is a father of a minor child and that the victim in this case was the mother of the child. The trial magistrate also accepted as a mitigating factor that there was no premeditation, that the incident occurred at the spur of the moment and that he showed his remorse by pleading guilty. In addition to the preceding mitigating factors, it was submitted on behalf of the appellant that he was remorseful. Also that he worked as a security guard and earned R300.00 a week. As a security guard the appellant was charged with an obligation of taking care of protecting the community against criminals including his own family. Ironically, his own wife became his victim. The trial magistrate correctly considered the prevalence of violent crime against women in its area of jurisdiction. Given the nature of the injuries sustained by the deceased and the long-term impact thereof, the trial magistrate correctly found that the offence committed by the appellant fell into “a category of the more serious instances of attempted murder” and distinguished it from the category of those offences where serious injuries are sustained but the prognosis for a recovery is good.
- [29] In my view there was no material misdirection by the trial court. It is my view that the trial court exercised its discretion judicially and properly. I am of the view that there is no need to tamper with the sentence.

[30] In the result the following order is made:

30.1 The appeal against sentence fails.

30.2 The sentence imposed by the trial magistrate is confirmed.

E. K. TSATSI, AJ

I agree.

M. B. MOLEMELA, J

On behalf of appellant: S. Kruger

Instructed by:

Bloemfontein Justice Centre

BLOEMFONTEIN

On behalf of respondent: Adv. K. G. Mashamaite

Director: Public Prosecutions

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